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In the
Supreme Court of the United States

OCTOBER TERM, 1961

No. 425

WILLIAM H. BILL CROSS,
FLOYD E. CULLINS, LYMAN
GAGE REYNOLDS, ALDEEN
CARSWELL and AMOS HARRIS, JR.,

Appellants,

STATE OF FLORIDA,

Appellee.

RESPONSE TO COURT

A. K. BLACK
P. O. Box 527
Lake City, Florida

Attorney for Appellant

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WILLIAM H. "BILL" CROSS, FLOYD L. CULLINS, LYMAN GAGE REYNOLDS, ALDEEN CARSWELL and AMOS HARRIS, JR.,

Appellants,

vs.

STATE OF FLORIDA,

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RESPONSE TO COURT

In response to the request that Appellants respond to the following:

> "Do the decision of the Supreme Court of Florida, dated May 5, 1961, and its order denying the Petition for rehearing dated June 6, 1961, or either of them, rest on an independent non-federal ground adequate to support judgment of that Court?"

The following is submitted:

Appellee questions the steps taken by Appellant in filing an Appeal from the District Court of Florida, First District, to the Supreme Court of Florida and from the Supreme Court of Florida to the United States Supreme Court and contends neither of the Florida Courts construed a controlling provision of either the Florida or Federal Constitution. Appellee (R. 1030) tactfully admits Appellants "May well have raised constitutional issues, both state and federal, both of the Courts below, (particularly the District Court of Appeals) merely affected an application; as opposed to either passing upon the validity of or construing a constitutional provision." It thus certainly follows, the Court by its orders dated May 5, 1961, and order denying Petition for Re-hearing dated June 6, 1961, decided the raised questions, adversely to Appellants or declined to pass upon the Constitutional question. In either event, there is a valid legal basis for and this Court should examine the facts and determine whether or not the use of the electronic listening device in invading the privacy of the apartment by means of a physical penetration, violated constitutional guarantees.

Appellants respectfully represent that at no time did the Supreme Court of Florida or the District Court of Appeals, First District, Florida, ever render an opinion in said case, nor did it put forward any ground of decision, for it to determine if that Court had rested its judgment on an independent nonfederal ground. Consequently, there is no way in which Appellants can ascertain legal reasons for the dismissal of the Appeal taken to the Supreme Court from the District Court of Appeals, First District, on May 5, 1961, and the Supreme Court's denial of a Re-hearing on June 6, 1961, thus avoiding the federal constitutional question raised at the

trial of said case in the Criminal Court of Record, Duval County, Florida, and again raised on Appeal to the District Court of Appeals, First District, State of Florida, and in the Supreme Court of Florida.

In the case of Wolfe v. State of North Carolina, 364 U. S. 177, 185, 80 S. Ct. 1482, 1487, (1960) this Court held that:

> "A state court may not avoid deciding federal questions and thus defeat jurisdiction of United States Supreme Court by putting forward nonfederal grounds of decision which are without any fair or substantial support."

It may correctly be assumed the Supreme Court of Florida considered the Petition for Re-hearing (R 977) in which it was urged the Supreme Court and the District Court either failed, refused, or neglected to properly consider the facts of the case and their relation to Julius Silverman v. United States, case No. 66, decided March 6, 1961, 5 L. Ed. (2d) 734, 81 S. Ct. 679, as to the search and seizure, as cited therein, and in addition thereto, the following Federal Constitutional questions. Socony-Vacuum Oil Co. v. United States, 310 U. S. 150, at page 233, and as cited in the case of Morris v. United States, (CCA 5th) 149 F. 123, 126, as to a denial of the right of confrontation under Article VI of the United States Constitution, the procurement and admission into evidence of the alleged confessions of Harris and Carswell and whether or not the denial of the Motion for Severance in the light of statements made by some of the defendants, and which statements were received in evidence against other defendants, was a denial of guaranteed rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.

On June 8, 1961, Application was made to the District Court of Appeal, First District, for leave to file another Petition for Re-hearing setting out the Silverman case, supra, and this was also denied without comment. This occurred after the Supreme Court of Florida denied the Petition for a Re-hearing and is therefore not a part of its record.

It has been inferred Appellants misconceived the remedy in filing a Petition for Writ of Certiorari in the Supreme Court of Florida, in order to review the action of the District Court, wherein the trial court was affirmed. Appellants contend that in order for the facts to be reviewed by the Supreme Court of Florida, an Appeal is the only remedy.

Certiorari is an original action in the sense that the subject matter of the suit or proceeding which it brings before the Court are not there reinvestigated, tried and determined upon the merits generally as upon an appeal. State v. Smith (1960 Florida App.) 118 So. 2d 792. In the case of Lake vs. Lake, 103 So. 2d 639, it is reflected that two Appeals are not contemplated; that the Court will not go behind a Per Curiam Affirmance with an undefined "possible exception." However, in the case of Dean vs. Deas, 116 So. 2d 23, the Supreme Court apparently went behind a Per Curiam Affirmance, and re-evaluated the case.

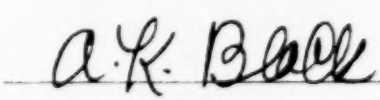
Certiorari is a discretionary writ. Gottlieb vs. Surfside, (1959 Fla App.) 115 So. 2d 25. Appellants contend they had a right to Appeal wherein a provision of the Florida or Federal Constitution is to be construed with respect to a search and seizure. It is said in Engel v. North Miami, (1959 Fla) 115 So. 2d 1, that Appeals will lie to it, where Constitutional Provisions have been construed.

In the case of Blackburn vs. State of Alabama, 354 U. S. 393, 77 S. Ct. 1098, where the record reflects there is an uncertainty as to whether or not the Alabama Court of Appeals passed on defendant's claim to protection under the Due Process Clause of the Fourteenth Amendment, the judgment was vacated and remanded in order that the Court might pass on such claim.

CONCLUSION

The Appellants contend that the federal grounds upon which the reversal is sought here, have been presented to the Appellate Courts of Florida and the orders referred to, dated May 5, 1961, and June 6, 1961, are based on federal grounds that were considered by the Courts.

Respectfully submitted:



A. K. Black
P. O. Box 527
Lake City, Florida

Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that six copies of the foregoing were furnished to Honorable Richard W. Ervin, Attorney General of the State of Florida, Tallahassee, Florida, by U. S. Mail on the 15th day of March, A. D. 1962.

A. K. Black

Attorney